IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

LA UNIÓN DEL PUEBLO ENTERO, et al., Plaintiffs, v. GREGORY W. ABBOTT, et al., Defendants.	Civil Action No. 5:21-cv-844 (XR) (consolidated cases)

JOINT MOTION TO CLARIFY SCHEDULING ORDER

Pursuant to this Court's direction, *see* Order at 6, ECF No. 490, the United States; the LUPE Plaintiffs, HAUL Plaintiffs, OCA-Greater Houston Plaintiffs, and Mi Familia Vota Plaintiffs (collectively "Private Plaintiffs"); State Defendants; Defendant-Intervenors; and the Bexar, El Paso, Harris, Hidalgo, and Travis County election administrators (collectively "County Defendants") jointly move for clarification of this Court's Amended Scheduling Order, ECF No. 437.

Substantive Scope of Discovery

The Amended Scheduling Order states, "Discovery on matters related to the general election as to all parties shall open on October 24, 2022." Am. Scheduling Order at 2. The parties interpret that sentence differently.

The United States and Private Plaintiffs. The United States and Private Plaintiffs take the position that the substantive scope of discovery during this period encompasses all relevant matters postdating the May 24, 2022, primary runoff, subject to typical limitations regarding privilege and proportionality. This follows from this Court's labeling of the initial period of

discovery as the period for "discovery on matters related to the primary election." *Id.* The parties thus conducted discovery during the "primary election" period concerning all matters up to and including the 2022 primary election, including the historical background and legislative history of SB 1. Similarly, matters contemporaneous with or subsequent to the general election period are proper subjects for discovery during the "general election" period. Specifically, the substantive scope of discovery should include documents created or published after the primary runoff, such as the December 2022 audit report addressing, *inter alia*, voting by mail in the 2020 General Election. *See, e.g.*, Tex. Sec'y of State, *Final Report on Audit of 2020 General Election in Texas* (Dec. 19, 2022), https://perma.cc/MH25-DW5Z. The audit is a relevant subject of inquiry on events occurring in the 2020 general election that preceded the enactment of SB 1 in 2021. Excluding this report from the scope of discovery would create a fundamental unfairness, as State Defendants may address mail voting generally or the audit specifically in summary judgment declarations or trial testimony. *Cf., e.g.*, *Covil Corp. ex rel. Protopapas v. U.S. Fidelity & Guar. Corp.*, 544 F. Supp. 3d 588, 596 (M.D.N.C. 2021) ("Excluding documents created after the close of discovery from the duty to supplement would encourage parties to wait until after discovery has closed to create documents containing potentially damaging information." (quoting *Iweala v. Operational Techs. Servs., Inc.*, No. 1:04-cv-2067, 2010 WL 11583114, at *2 (D.D.C. Apr. 13, 2010))). And because the Secretary of State published the 359-page audit report after the 2022 general election, the United States and Private Plaintiffs had no opportunity to inquire about it during the primary election discovery period.[1]

[1] To the extent that the Court determines its prior order does not encompass these subjects, good cause exists for modification to permit discovery concerning documents and other materials newly created after the May 2022 primary runoff. *See* Fed. R. Civ. P. 16(a)(4); *Springboards to Educ., Inc. v. Houston Indep. Sch. Dist.*, 912 F.3d 805, 819 (5th Cir. 2019).

State Defendants. State Defendants note that the "general election discovery period" is limited as to both subject matter and time. The phrase "matters related to the general election" limits discovery during the current period to matters reasonably related to the 2022 General Election. In applying that limitation, it makes practical sense to also recognize a time limit of May 25, 2022 (the day after the Primary Runoff Election) through February 15, 2023 (the last day to send written discovery for the general election discovery period). However, that time limitation does not nullify the amended scheduling order's subject matter limits. Arguments to the contrary attempt to expand the order three weeks before discovery closes rather than interpret its plain meaning. While the United States focuses on the forensic audit of the 2020 General Election, its expansive reading would extend discovery to any document or matter postdating May 24, 2022, subject only to the normal constraints of Rule 26(b).

The United States' view of the scheduling order would be improper even if it were limited to the forensic audit, of which it has long been aware. The Texas Secretary of State announced the audit on September 23, 2021. The Phase 1 Progress Report on Full Forensic Audit of 2020 General Election was released on December 31, 2021. State Defendants provided a copy of this already publicly available document in early April 2022. But the United States only now seeks discovery on the audit. That attempt falls far outside the legitimate scope of general election discovery.[2]

The language regarding Primary Election Discovery supports State Defendants' position. Most of the discovery conducted prior to the general election discovery period was governed by

[2] The 2020 General Election Audit may have been discoverable under State Defendants' obligation to supplement pursuant to Rule 26(e). However, the United States failed to include any topics related to the audit in its March 15, 2022, Notice of Deposition to the Office of the Texas Secretary of State. The United States confirmed its disinterest in that topic by neglecting to ask even a single question about the audit during this initial Rule 30(b)(6) deposition.

the Court's original scheduling order, which did not impose subject matter limitations beyond those contained in the Federal Rules. *See* ECF 125 (issued on November 18, 2021, and establishing May 13, 2022, as the deadline for the completion of all discovery). The amended scheduling order allowed five broadly worded subcategories of discovery that remained outstanding at the end of the previous generalized discovery period to be completed during the primary discovery period. ECF 437 at 1. By contrast, the amended scheduling order enumerated only two categories of discovery that would be proper during General Election Discovery: 1) matters relating to the November 2022 General Election, and 2) documents produced in response to successful motions to compel filed during the primary election discovery period. *Id*. at 2. No controversy presently exists as to the latter subject matter. The text's clear meaning should govern the former and apply equally to all parties in this litigation.

Intervenor-Defendants. Intervenor-Defendants maintain that the general election discovery permitted by the Court's various orders relates only to documents created, or matters that occurred, from May 25, 2022 (the day after the primary run-off) through February 15, 2023, that are reasonably related to the 2022 General Election. Indeed, the Court has already clarified that the purpose of the general election discovery period is to "address[] matters specific to the general election." Dkt. No. 490 at 7.

County Defendants. El Paso County Elections Administrator Lisa Wise, and Harris County Elections Administrator Clifford Tatum write separately to request that any order on this Motion makes clear that the scope of discovery to which they are currently subject remains confined to "matters relating to the November 2022 general election" as set forth in the Court's Amended Scheduling Order of June 8, 2022. ECF No. 437, Am. Scheduling Order at 2. Any order concerning the audit report released by the state in December 2022 should not affect El

Paso County, since El Paso County was not subject to that audit and its contents do not relate to El Paso County. Therefore, any written discovery served on or any depositions taken of Defendant Wise and her office should remain confined to "matters *relating to* the November 2022 general election." ECF No. 437, Am. Scheduling Order at 2 (emphasis added) ("The deadline for completion of fact discovery on matters related to the general election as to all parties is March 17, 2023."). Defendant Wise and her office object to written discovery or deposition questioning to the extent any other party asserts that such written discovery or deposition questioning should extend beyond that scope.

Bexar, Hidalgo, and Travis Counties join in this request.

Depositions

The Amended Scheduling Order also states with respect to the current discovery period, "The parties may commence or reopen no more than 10 depositions per side, absent further leave of the Court." Am. Scheduling Order at 2. The parties again disagree as to the substantive significance of this sentence.

The United States and Private Plaintiffs. The United States and Private Plaintiffs take the position that these depositions may last up to "one day of 7 hours." Fed. R. Civ. P. 30(d)(1). Of note, the United States has noticed a Rule 30(b)(1) deposition of Director Keith Ingram of the Elections Division of the Office of the Texas Secretary State—a Tier 1 witness identified by State Defendants in their initial disclosures—and has informed State Defendants of its intention to notice a Rule 30(b)(6) deposition of the Office of the Texas Secretary of State, a named Defendant. State Defendants may choose to designate Director Ingram to testify on behalf of the Office of the Texas Secretary of State, but that decision cannot create limitations on the length of either deposition. Rather, courts have consistently "rejected the argument that a Rule 30(b)(6)

deposition is unnecessary or cumulative simply because individual deponents—usually former or current employees of the entity whose Rule 30(b)(6) deposition is sought—have already testified about the topics noticed in the Rule 30(b)(6) deposition notice." *La. Pac. Corp. v. Money Mkt. 1 Institutional Inv. Dealer*, 285 F.R.D. 481, 487 (N.D. Cal. 2012); *see also, e.g.*, *Appleton Papers Inc. v. George A. Whiting Paper Co.*, No. 08-cv-16, 2009 WL 2870622, at *2 (E.D. Wis. Sep. 2, 2009); *Alfadda v. Fenn*, 149 F.R.D. 28, 30 (S.D.N.Y. 1993). This distinction is no less applicable where the entity designates as its representative an individual already noticed as a fact witness. Indeed, collapsing the distinction in that circumstance would create "substantial potential for over-reaching," including that "any entity that wanted to limit the testimony of an individual could accomplish that goal by designating the individual as a 30(b)(6) witness." *Sabre v. First Dominion Cap., LLC*, No. 01-cv-2145, 2001 WL 1590544, at *1 (S.D.N.Y. Dec. 12, 2001); *see also, e.g.*, *Cincinnati Ins. Co. v. Desert State Life Mgmt.*, No. 18-cv-981, 2020 WL 5369061, at *5 (D.N.M. Sept. 8, 2020). The United States and Private Plaintiffs have committed to be efficient and respectful of the deponents' time, and have offered to attempt to conduct in a single day both Director Ingram's Rule 30(b)(1) deposition and any portion of the Rule 30(b)(6) deposition for which the Office of the Secretary of State designates Director Ingram as its witness. However, no preemptive limitations are warranted.[3]

[3] The parties have successfully negotiated an appropriate length for the deposition of Bexar County, which will occur on Tuesday, February 28. Negotiations are ongoing as to an appropriate length for other county depositions, balancing the needs of the parties, the roles of the counties in implementing the challenged provisions of SB 1, and the burden on county officials. *See* Fed. R. Civ. P. 26(b)(1). With respect to counties that State Defendants intend to depose, the United States and Private Plaintiffs merely seek to participate with equal time. At this time, no ruling on the application of the Court's scheduling order to these specific defendants is warranted.

State Defendants. State Defendants note that the length of depositions of previously deposed witnesses is not addressed in this Court's amended scheduling order. Instead, the Federal Rules of Civil Procedure govern. While those Rules allow for a deposition to last up to "one day of 7 hours," Fed. R. Civ. P. 30(d)(1), they also provide that the court must limit the frequency or extent of discovery otherwise allowed if that discovery is unduly duplicative, there has been ample opportunity to obtain the information through other discovery in the same action, or the discovery is not proportional to the needs of the case, Fed. R. Civ. P. 26(b)(2)(C). Although State Defendants believe all three circumstances apply to the forthcoming depositions of Keith Ingram and the Office of the Texas Secretary of State, they have nonetheless attempted in good faith to reach agreement with the United States about reasonable time limits in order to avoid court intervention.

Mr. Ingram was previously deposed in his individual capacity for 4 hours and 17 minutes. He was also the sole designee during the first Section 30(b)(6) deposition of the Texas Secretary of State, which lasted for 7 hours and 38 minutes over the course of two days. Mr. Ingram has thus already been deposed in this litigation for almost 12 hours. Requiring him to sit as a fact witness for up to an additional 7 hours, in addition to his substantial responsibilities pursuant to any forthcoming Rule 30(b)(6) deposition, is unreasonable, unduly burdensome, and contrary to the Federal Rules.

Finally, State Defendants note that it is unclear whether the United States considers these upcoming depositions to be reopened or newly commenced. If reopened, State Defendants' position is that Rule 30(d)(1)'s 7-hour time limit applies as to the combined primary election discovery period and the general election discovery period, which leaves the United States with no additional time for the Rule 30(b)(6) and less than 3 hours for Mr. Ingram's individual

deposition. However, in an attempt to compromise, and in recognition that some amount of additional deposition testimony is likely warranted, State Defendants have heretofore treated the depositions as newly commenced. Given Mr. Ingram's outsized role in any Rule 30(b)(6) deposition, State Defendants have sought to address the issue of reasonable time limitations in tandem, but they have never conflated the two proceedings.

State Defendants proposed a total of 9 hours of combined record time for the two depositions, with Mr. Ingram being deposed for no more than 6 hours of combined record time and any other designees for the Rule 30(b)(6) deposition being limited to no more than 3 hours of record time. Under this proposal, the United States could have allocated the time between the two depositions as it saw fit, including foregoing Mr. Ingram's individual deposition altogether and instead extending this new Rule 30(b)(6) deposition to 9 hours of record time. Rather than continuing to work toward compromise, the United States responded by issuing a deposition notice for Mr. Ingram and alerting State Defendants that the Rule 30(b)(6) notice was soon to follow. Though State Defendants' attempts at compromise have been unsuccessful, they nonetheless remain willing to continue working toward a reasonable solution. Absent agreement, or contrary guidance from the Court, State Defendants may need to move for protection.

County Defendants. El Paso County Elections Administrator Lisa Wise and Harris County Elections Administrator write separately to address the length of any deposition of themselves or representatives of their offices. Defendant Wise previously sat for 7 hours and 27 minutes in a 30(b)(6) deposition of the El Paso County Elections Administrator and for 7 hours and 29 minutes in a 30(b)(1) deposition. The prior Harris County Elections Administrator sat for a total of approximately seven hours of deposition testimony. The State Defendants, the United States, and Private Plaintiffs participated in those depositions. Since then, on February 21, 2023,

the State Defendants sent a notice for a 30(b)(6) deposition of the El Paso County Elections Administrator that contains 27 topics and a notice to the Harris County Elections Administrator that contains 28 topics, and the United States and Private Plaintiffs have indicated that they are interested in participating in this deposition and/or further deposing Defendant Wise in her individual capacity. On a meet and confer call among the parties on February 24, 2023, both the United States and State Defendants indicated that they may seek up to seven hours total or beyond for these depositions of El Paso County, and the State Defendants indicated that they alone may seek up to eight or nine hours for a depositions of the Harris County Elections Administrator's office. Notably, "[t]he deadline for completion of fact discovery on matters related to the general election as to all parties is March 17, 2023." Am. Scheduling Order at 2.

Defendants Wise and Tatum respectfully requests that any further deposition of themselves and/or a representative of their office be limited to four hours in total, split evenly between the Defendants and Intervenors on one side and the United States and the Private Plaintiffs on the other. (Two hours for Defendants and Intervenors together and two hours for the United States and the Private Plaintiffs together). Defendants Wise and Tatum still plan to confer with the State Defendants regarding deposition limitations. Given the limited scope of discovery during the current discovery period and the fact that the parties have had over fourteen hours on record to explore the El Paso County Elections Administrator's election procedures and past elections and seven hours total for the Harris County Election Administrator's office, four hours total of additional deposition time is proportional to the needs of this case, as it balances the parties' needs for limited follow-up discovery with the burdens on Defendants Wise, Tatum, and their office's time. *See* Fed. R. Civ. P. 26(b)(1).

In addition to the proportionality considerations that arise from Defendants Wise and Tatum having already provided nearly 15 hours and 7 hours of deposition testimony respectively—and the constraints on their time associated with her job responsibilities—a four-hour (total) limit on additional deposition time of Defendant Wise and her office and Defendant Tatum and their office is further justified by the burdensome and voluminous written discovery that was recently served on County Defendants in this case. Specifically, State Defendants and Private Plaintiffs recently served six new sets of written discovery on Defendants Wise and Tatum on the last possible day, making her responses due on March 17—the same day as the close of discovery.

Conclusion

The parties respectfully request clarification of these issues at the Court's earliest convenience, in light of the March 17 close of fact discovery. *See* Am. Scheduling Order at 2.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system, which will send notification of this filing to counsel of record.

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